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89-1994

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROLAND MASTANDREA, et al.,
Petitioners,

vs.

THE NEWS HERALD, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
Court of Appeals of Ohio, Eleventh Appellate District
(Lake County, Ohio)

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QUESTIONS PRESENTED

1. Whether summary judgment should have been granted in a public official's defamation case against a newspaper where a reasonable jury could have found with convincing clarity that a defamatory statement was made with actual malice where (1) the reporter who wrote the story had reliable information which caused him to **exclude** the defamatory statement from the story; (2) the defamatory falsehoods were added by an editor without consultation with the reporter; (3) the reporter told the Petitioner two days after the story was written that it had been altered by an editor and that Petitioner should be "pissed" about it and that the alteration showed how poor the newspaper was at "policing" itself; and (4) the newspaper's editor

profoundly disliked the Petitioner and editorially urged voters to end his political career?

2. Whether a former candidate for public office who is defamed more than six months after the election by a newspaper that falsely alleged that he was found "guilty" by a "court" of election crimes when its reporter had strong reason to know and/or actually knew that such was not true must satisfy the actual malice standard in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)?

3. Whether summary judgment should have been granted to a newspaper and one of its reporters where, assuming Petitioner was a public official or public figure six months after he was an unsuccessful mayoral candidate for an Ohio city, a reasonable jury could have found

with convincing clarity that defamatory statements were made with actual knowledge of falsity and/or a high subjective awareness of probable falsity where the reporter (1) had actual knowledge of the role and purpose of a quasi-judicial election commission but ignored such; (2) without any investigation and after associating with Petitioner's political opponents during that commission's proceedings, published a story claiming that Petitioner had been found "guilty" of election crimes by a "court" when the only thing that had been determined was that there was probable cause to refer the charges to a prosecuting attorney?

PARTIES TO THE PROCEEDINGS

Petitioners are Roland Mastandrea and Maureen Mastandrea, husband and wife. They are residents of the City of

Willoughby, Lake County, Ohio. With respect to the first issue above, respondents are the Lorain Journal Co., The News Herald, and a reporter named Paul O'Donnell. The Lorain Journal Co. is a corporation organized and operated under the laws of the State of Ohio and is engaged in the business of publishing, printing, and circulating newspapers, one of which is The News Herald, a newspaper of general circulation in Lake County, Ohio. With respect to the second and third issues, respondents are Rowley Publications, Inc., the Lake County Telegraph and one of its reporters, Geoffrey Haynes. Rowley Publications, Inc. is a corporation engaged in the business of publishing, printing and

circulating newspapers including, at the time of the events in this case, the Lake County Telegraph, a newspaper of general circulation in Lake County, Ohio. [1]

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[1]Petitioners originally asserted claims for defamation and intentional and negligent infliction of serious emotional distress against a number of individuals, to wit: Richard A. Wagner, Richard A. Piepsny, Sandy Riggin, Eric R. Knudson, William Ryan, George L. Gamber, Charles W. Cox, Helen Morris, George Tegner, Jr., George Tegner, III, Larry Tegner. All of these claims have been abandoned.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROLAND MASTANDREA, et al.

Petitioners,

vs.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the United States

OPINIONS BELOW

The journal entry of the Court of Common Pleas of Lake County, Ohio granting summary judgment to the Respondents is unreported and is set forth in the Appendix at A38.

The judgment entry and opinion of the Court of Appeals of Ohio, Eleventh Appellate District, Lake County, Ohio

affirming the Court of Common Pleas of Lake County's order granting summary judgment to the Respondents is unreported and is set forth in the Appendix a A3.

The judgment entry of the Supreme Court of Ohio declining to review the Court of Appeal's decision is unreported and is set forth in the Appendix at A1.

JURISDICTION

1. On March 21, 1990, the Supreme Court of Ohio overruled Petitioner's motion for an order directing the Court of Appeals for Lake County, Ohio to certify its record and denied Petitioner's appeal as of right. This constitutes the final order of the Supreme Court of Ohio with respect to this case.

2. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C.A. Section 1257(3) (1989).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. The Facts

1. This libel case involves separate groups of respondents and separate defamatory newspaper articles. The first claim is against The News Herald, a newspaper in Northeastern Ohio that is owned by the Lorain Journal Company. The second is against The Lake County Telegraph, a newspaper in Northeastern Ohio that was owned by Rowley Publications, Inc. and which was later purchased by the Lorain Journal Company

and then closed down. The latter claim also involves a reporter named Geoffrey Haynes. As the claims are only tangentially related, they are separately described below.

I.

2. The first case involves a front page article published in The News Herald on November 8, 1983. The article, a true and complete copy of which is in the Appendix at A40, was entitled **"Mastandrea admits distributing 'smear' fliers."** In the first paragraph of the article, Petitioner, Roland Mastandrea,[1] is further alleged to have "admit[ted that] he and

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[1]Mr. Mastandrea is the principal Petitioner. However, his wife, Maureen, is also a petitioner but her claims are solely for loss of consortium which are derivative of her husband's claims. "Petitioner" is used in the singular herein for clarity only.

several campaign supporters distributed anonymous literature . . . attacking [the incumbent mayor] and four councilmen."

3. Roland Mastandrea was a candidate for mayor of Willoughby, Ohio, a suburb of Cleveland, Ohio. He was also an elected councilman in Willoughby at the time. The 1983 Willoughby mayoral race was a tight one and he chose to conduct a positive campaign without directly criticizing his opponents' records or positions. Some of Petitioner's supporters were unhappy with his unwillingness to attack directly certain elected officials and to challenge them on certain issues. These supporters, who were not officially a part of Petitioner's campaign committee, decided on their own to distribute a blunt, somewhat polemical flier in the community several days before the election. That flier, not associated with Petitioner's campaign, was called "Wake Up Willoughby"

and is in the Appendix at A41. Mastandrea was not told about the flier and he did not participate in its distribution.

4. A brouhaha erupted over the contents of the flier. The News Herald assigned several reporters to the story to find out who distributed the fliers and why. Several persons involved in passing out the flier told The News Herald's reporters that they were involved and they uniformly made it clear that Mastandrea had nothing to do with it. For his part, Mastandrea denied passing it out. The News Herald reported that those criticized in the flier were "infuriated" by it and quoted one of them as calling it "scurrilous" and "yellow journalism at its worst". The News Herald editorially called it "Blowing Smoke in the Eleventh Hour" and said that those who were responsible for it were "cowards."

5. The controversy boiled over to such an extent that Mastandrea decided that it was seriously hurting his campaign. He thus decided to publicly accept moral responsibility for it since those who distributed it supported his campaign and since the flier was originally conceived at a campaign meeting (at which he was not in attendance). He had rejected the flier as too blunt and inconsistent with the positive image that he wanted to portray. He issued a one page explanation entitled "From R. Mastandrea" (Appendix at A42) to this effect. Mastandrea was careful to meet with The News Herald's reporter covering the story, Paul O'Donnell, to make sure that O'Donnell knew that Mastandrea had nothing to do with the actual distribution of the flier but, instead, that he was merely taking "moral responsibility" for its existence.

6. O'Donnell wrote an article on a computer terminal that accurately described what Mastandrea had told him and which did **not** accuse Mastandrea of distribution or admitting to distributing the fliers. However, O'Donnell's article was deliberately altered by an unknown editor to include the assertion that Mastandrea admitted distributing "smear fliers" and had in fact distributed them himself. A headline was added saying in bold type **"Mastandrea admits distributing 'smear' fliers"**. The article was the lead story on page one the next day.

7. Petitioner's political opponents quickly exploited the article. They made a large number of copies of it, and passed it out at the City's polling places. Petitioner lost the election by a significant margin even though polls had shown it to be very close until the controversy over the flier erupted.

8. Upset by the fact that The News Herald had deliberately misconstrued his statements about the flier and had disregarded eyewitness accounts that exonerated him from distributing any of the fliers, Petitioner arranged a meeting with reporter O'Donnell on November 10, 1983. During that meeting, which was tape recorded, O'Donnell admitted that the article was wrong; he said that someone at the paper had changed it to assert that Petitioner had distributed and admitted to distributing the handbill after O'Donnell turned it in. O'Donnell told Petitioner that he should be very upset ("real pissed") about it. O'Donnell said that such an alteration showed how bad The News Herald was at "policing itself."

II.

9. The second libel claim in this case arises out of a different article in

a different newspaper more than six months later. That article arose as follows. The successful mayoral candidate and four councilmen criticized in the "Wake Up Willoughby" flier filed charges with the Ohio Elections Commission[2] contending that Petitioner had violated Ohio's election laws by distributing unsigned campaign literature and about making false statements about other candidates in the "Wake Up Willoughby" flier. On May 10, 1984, a hearing was conducted by the Ohio Elections Commission at which Petitioner participated. The purpose of the hearing under the statute then in effect was to determine if probable cause existed to

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[2]The Ohio Elections Commission was established to investigate alleged violations of Ohio's election laws. Ohio Rev. Code §§3317.14 et seq. On the date of the hearing in May, 1984, the Commission was limited to making a probable cause determination. Ohio Rev. Code §3599.091.

refer the alleged improprieties to the County prosecutor for possible criminal proceedings. See, Ohio Rev. Code §3599.091. Geoffrey Haynes, a reporter for the Lake County Telegraph, a newspaper serving the Willoughby, Ohio area, observed and testified at the hearing. Mr. Haynes drove to and from the hearing (a distance of approximately 140 miles each way) with Petitioner's accusers; he observed the proceedings for the entire day; he had dinner with Petitioner's accusers and their attorney, and he returned with them to Willoughby. He went straight to his office and wrote an article, published as the lead story on the front page the next day, asserting that **"Mastandrea [was] Guilty in Willoughbygate."** (Appendix A43).

10. Haynes asserted in the article that Petitioner had been found "guilty" by the Ohio Elections Commission, (which he

called a "court") of two election law violations for which Petitioner could receive a jail sentence and substantial fines.

11. The Ohio Elections Commission made no such findings. Instead it merely determined that there was "probable cause" to believe that Petitioner had violated the election law and voted to refer the matter to the Lake County, Ohio Prosecuting Attorney for investigation and action. A Grand Jury later refused to indict the Petitioner. The transcript of the Election Commission's proceedings is part of the record and is replete with references concerning the purpose for and import of the hearing.

THE PROCEEDINGS

1. Petitioners filed this case pro se on November 7, 1984. Counsel later

entered an appearance, amended the complaint, and extensive discovery ensued.

2. Motions for summary judgment were filed by both groups of Respondents.

3. An extensive memorandum supported by affidavits and deposition transcripts was filed by Petitioners in opposition to these motions.

4. The trial court granted summary judgment for all Respondents on January 29, 1988.

5. On February 29, 1988 Petitioners appealed to the Court of Appeals for the Eleventh Appellate District, Lake County, Ohio. On November 7, 1989, that Court affirmed the trial court's entry of summary judgment.

6. On December 6, 1989, Petitioners appealed to the Supreme Court of Ohio. Their memorandum in support of jurisdiction was filed on January 22, 1990. The Supreme Court of Ohio denied

Petitioner's motion to certify the record, and declined to review the case on March 21, 1990. This constitutes the final order of the Supreme Court of Ohio in this case.

REASONS FOR GRANTING PETITIONER'S WRIT

I.

AS TO THE NEWS HERALD

SUMMARY JUDGMENT IN FAVOR OF THE NEWS HERALD WAS IMPROPER BECAUSE A JURY COULD FIND ACTUAL MALICE WITH CONVINCING CLARITY WHERE THE EVIDENCE SHOWED THAT THE NEWSPAPER'S OWN REPORTERS HAD STRONG REASON TO KNOW AND/OR ACTUALLY KNEW THAT PETITIONER DID NOT DISTRIBUTE OR ADMIT TO DISTRIBUTING THE "SMEAR" FLIERS AND WHERE ONE OF ITS REPORTERS ADMITTED THAT HIS STORY WAS SURREPTITIOUSLY ALTERED BY AN EDITOR TO INCLUDE THE ASSERTION THAT

PETITIONER DISTRIBUTED AND ADMITTED DISTRIBUTING "SMEAR" FLIERS; THE SAME REPORTER ALSO OPINED THAT PETITIONER SHOULD BE "REAL PISSED" ABOUT THE ALTERATION WHICH DEMONSTRATED THAT THE NEWSPAPER WAS "REALLY BAD" AT POLICING ITSELF.

Petitioner's evidence in opposition to The News Herald's motion for summary judgment was fully sufficient to satisfy the actual malice standard. "Actual malice" means publishing a defamatory statement with knowledge of its falsity or with reckless disregard of whether it is true or false. New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). In response to a properly supported motion for summary judgment, a public official libel plaintiff must demonstrate by competent documentary evidence that a reasonable trier of fact could find actual

malice with convincing clarity. Anderson v. Liberty Lobby, Inc., 477 U.S. 243 (1986). If he does so, there is a genuine issue of fact for trial and summary judgment may not be granted. Id. at 2514. All reasonable inferences in the evidence are to be construed in favor of the non-moving party. Fed. R. Civ. Proc. 56; Ohio R. Civ. Proc. 56.

How a public official establishes actual malice in response to a properly supported summary judgment motion is at the heart of this case. The sufficiency of the evidence in a summary judgment proceeding is a question of law. Bose v. Consumer's Union of the United States, Inc., 466 U.S. 485, 510-511 (1984). Appellate courts must independently review the evidence to determine if the evidentiary standard in a libel case has been met and properly applied. Ibid.

Actual malice can be demonstrated by clear and convincing evidence showing that a defendant published a knowing falsehood or otherwise acted with "reckless disregard" for the truth. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The term "reckless disregard" cannot fully be encompassed by one infallible definition. St. Amant v. Thompson, 390 U.S. 727, 730 (1968). It definitely includes instances where a defendant has a "high degree of awareness of probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). It likewise applies where a defendant has "entertained serious doubts as to the truth of his publication." St. Amant, supra, 390 U.S. at 731. The conduct and state of mind of the defendant is the proper focus. Herbert v. Lando, 441 U.S. 153, 160 (1979). A defendant's state of mind may be proved circumstantially ie. from ". . . objective circumstances from

which the ultimate fact could be inferred." Ibid. Evidence of motive can bear some relationship to the actual malice inquiry. Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678, 2686 (1989). Proof of actual malice "calls a defendant's state of mind in question and thus does not readily lend itself to summary judgment." Hutchinson v. Proxmire, 443 U.S. 111, 120, N. 9 (1981).

With respect to The News Herald's story of November 8, 1983, Petitioner concedes readily that he was a public official for libel law purposes. The actual malice standard thus fully applied to him.

The evidence establishing that The News Herald published the November 8, 1983 article with actual malice is easily summarized: Petitioner and three (3) independent witnesses informed two of the

newspaper's reporters, Paul O'Donnell and David Jones, that Petitioner had nothing whatever to do with distributing the flier. No evidence exists that The News Herald had any factual basis for asserting otherwise. In fact, the author of the story did not assert that Petitioner had distributed or had admitted distributing the fliers when he turned it in. Instead, an unknown editor deliberately altered the story to include the assertion that Petitioner distributed and admitted distributing the "smear" fliers when Petitioner had done no such thing.

A compelling additional fact strongly suggesting actual malice is that the author, Mr. O'Donnell, told Petitioner just two days after the article was published, that Petitioner should be "real pissed" about the way the story was changed. He indicated that the change

showed that the paper was "really bad at policing [itself]."

The best evidence of the newspaper's doubts about the truth of the assertion is the fact that its own reporter did not support what it published, notwithstanding his later testimony favorable to The News Herald.[3]

The News Herald's motive for surreptitiously altering O'Donnell's story is also apparent from the record. Its editor, Jim Collins, vehemently disliked the Petitioner. Just two days before the

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[3]The tape recording of O'Donnell's and Petitioner's discussion on November 10, 1983, a transcript of which is part of the record, reveals that O'Donnell said that he did not write the headline or the assertion about Petitioner distributing the flier; O'Donnell said that Petitioner should be "real pissed" about it and that The News Herald "was bad at policing [itself]." O'Donnell changed his view by the time of his deposition wherein he said that he was "not particularly" offended, bothered, disturbed or concerned about it. (Depo. at 32).

actionable article was published, Mr. Collins wrote a stinging editorial urging the electorate to "end [Petitioner's] political career." Such vehemence and hostility strongly suggest why the actionable article was printed and equally suggest that The News Herald entertained serious doubt as to the truth of the article but published it anyway.

A reasonable jury, examining the foregoing evidence and construing it in favor of Petitioner, could easily conclude that The News Herald published the allegations as to Petitioner's involvement with distribution of the "smear" fliers with a "high subjective awareness of their probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). Summary judgment was thus entirely unwarranted.

Notwithstanding this strong evidence of actual malice, the trial court and the Court of Appeals of Ohio, Eleventh

Appellate District concluded that it was legally insufficient to establish a genuine factual dispute as to The News Herald's actual malice. It is apparent from the opinion of the Court of Appeals that it utterly failed to seriously analyze the evidence and it likewise ignored the reasonable conclusion that could be drawn from the evidence that a deliberate falsehood was inserted in the story during the "editing process." The Court glossed over the fact that the reporter who wrote the story acknowledged that, as altered, Petitioner should be upset about it and that the printed story demonstrated the poor job that the paper did in "policing" itself.

The Court of Appeals gave ostensibly no weight to the evidence submitted by Petitioner demonstrating that two News Herald reporters were specifically informed about who distributed the flyer

and, most importantly, that Petitioner did **not** do it. Clearly a reporter's knowledge should be imputed to the newspaper itself. It would be a perversion of the law of defamation to exonerate a newspaper that deliberately altered a story by "editing" it to include an allegation that its own reporter knew was false by contending that information which its reporters had was not imputable to the editors who changed the story. That this is the holding of the Court below is evident from the following:

> One of the[se] exhibits [appended to Petitioner's memorandum in opposition to summary judgment] is a copy of a transcript of a meeting between Roland Mastandrea and Paul O'Donnell which Mastandrea recorded unbeknownst to O'Donnell. In their appellate brief, appellants state that this transcript is the best evidence that the Lorain Journal knowingly published a defamatory falsehood. However, a perusal of this transcript does not reveal evidence tending to show that either O'Donnell or the Lorain-Journal had <u>actual knowledge</u> that the disputed statements in the article were false or that he had a high degree of awareness of their

> probable falsity. In support of their arguments, appellants specifically cited a portion of the transcript in which O'Donnell allegedly admits that the article was edited and altered by the Lorain Journal after he turned it in and that Roland Mastandrea should be "pissed" about it. Specifically, his comments were: "I think you ought to be real pissed about it. We always--we being the newspaper--always talk about responsibility and how we have to have responsible (sic). I think we are really bad policing ourselves." His comments are therefore not probative that the Lorain Journal article was false or that it had a high degree of awareness of its probable falsity at the time of the alteration.

This case thus presents a compelling opportunity to more fully articulate how the principles in Anderson v. Liberty Lobby, Inc., 477 U.S. 243 (1986) should be applied where there is strong evidence of actual malice submitted in opposition to a summary judgment motion in a libel case brought by a public official.

II.

AS TO THE LAKE COUNTY TELEGRAPH

SUMMARY JUDGMENT WAS IMPROPERLY GRANTED TO THE LAKE COUNTY TELEGRAPH AND TO GEOFFREY HAYNES WHERE PETITIONER'S EVIDENCE ESTABLISHED THAT HAYNES KNEW THAT THE PROCEEDING ABOUT WHICH HE WAS REPORTING WAS NOT A COURT PROCEEDING, THAT PETITIONER WAS NOT FOUND "GUILTY" OF ANYTHING, AND THAT THE PROCEEDING WAS MERELY A PROBABLE CAUSE HEARING; A JURY COULD CLEARLY AND CONVINCINGLY FIND FROM THE EVIDENCE THAT RESPONDENTS' ASSERTIONS THAT PETITIONER WAS FOUND GUILTY OF A CRIME BY A COURT WAS A PUBLICATION OF A KNOWING FALSEHOOD AND/OR WAS PUBLISHED DESPITE A HIGH SUBJECTIVE AWARENESS OF PROBABLE FALSITY.

The documentary evidence submitted by Petitioner in opposition to these

Respondents' motion for summary judgment established the following:

1) Mr. Haynes was present throughout the proceedings that were conducted by the Ohio Elections Commission wherein it was repeatedly indicated that the issue was not whether Mr. Mastandrea was guilty of a crime or other misconduct but, instead, whether there was probable cause to believe that Petitioner had violated the election laws so that a referral could be made to the Lake County Prosecutor's Office;

2) Mr. Haynes knew that the Ohio Elections Commission was not a "court" and that it had no right to impose fines on or imprison the Petitioner;

3) Mr. Haynes knew that Petitioner had not been found "guilty" of any crime or other misconduct by the Ohio Elections Commission but that, rather, that it had merely decided that there was sufficient

cause to refer the case to the local prosecutor;

4) Mr. Haynes placed himself in a position to be unduly influenced by Petitioner's detractors and accusers by driving to and from the hearing with them and by participating in a celebratory dinner with them;

5) Mr. Haynes was guilty of gross negligence in failing to investigate the import of the Ohio Election Commission's decision, by writing the article in the middle of the night without sleeping, and by ignoring numerous objective indicators that showed that his assertions in the article were completely unmeritorious and flatly wrong.

Assuming that Petitioner retained his public official status at the time that

this article was written[4], he was obliged to demonstrate in opposition to Respondents' motion for summary judgment that there was sufficient evidence on which a reasonable jury could rely to conclude clearly and convincingly that Haynes and his paper knew that the assertions were not true and published them anyway or did so with a high subjective awareness of their probable falsity. New York Times v. Sullivan, 376 U.S. 254 (1964). The points set out above demonstrate that Petitioner met his burden and was wrongly deprived of the right to redress his reputational injury caused by the article.

It is hard to imagine a clearer case of actual malice than that in the case at bar. The reporter was told both by the

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[4]As to which, see Section III, infra.

Petitioner and by listening to the proceedings before the Elections Commission that the proceeding was a probable cause hearing only. Despite this information, he wrote that Petitioner had been found "guilty" by a "court" of conduct which constituted a crime. A reasonable jury could certainly find from this evidence that the assertions were deliberate falsehoods or, at least, that they were written with a high subjective awareness of their probable falsity. This is not a case where a reporter has conflicting information or was given conflicting stories -- here he was told precisely what the import of the hearing was and he was at the hearing. Yet his story was totally at odds with what he was told and observed and what the law provides. He did no investigation to determine whether his assertions were true and he wrote the story in the middle of

the night after having voluntarily associated himself with those persons who were accusing Petitioner of violating the law.

Mr. Haynes has attempted to avoid liability by asserting that he just did not understand what the Ohio Election Commission was doing. This is totally implausible in view of the evidence showing that he was told precisely what the Commission was doing and what it had done. In St. Amant v. Thompson, 390 U.S. 727, 732 (1968), it was correctly observed that

> [p]rofessions of good faith will be unlikely to prove persuasive . . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will that be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the information or the accuracy of his reports.

If a reporter can avoid liability for defamation by merely asserting that he made a "mistake" when there is no plausible reason to believe that such a "mistake" was made, then the actual malice standard can be manipulated so that no reporter and his paper can **ever** be held liable.

While the actual malice standard undoubtedly exists to provide breathing space so that the law of libel does not unduly infringe on freedom of the press, it was not intended to bar even a trial in a case such as this. Respondents have, until now, successfully used that standard to shield them from liability despite the fact that evidence could reasonably be construed by a jury to clearly and convincingly show that they acted with actual malice. This Court should correct this injustice.

III.

PETITIONER WAS NOT A PUBLIC OFFICIAL OR PUBLIC FIGURE WHEN THE LAKE COUNTY TELEGRAPH PUBLISHED DEFAMATORY FALSEHOODS ABOUT HIM NOR DID THEY DIRECTLY RELATE TO HIS CONDUCT AS A PUBLIC OFFICIAL; ACCORDINGLY, HE DID NOT HAVE TO DEMONSTRATE ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE IN RESPONSE TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND THE DECISION OF THE OHIO COURTS TO THE CONTRARY IS ERRONEOUS AND SHOULD BE REVERSED.

There is no dispute that Petitioner was an elected official and a candidate for public office when The News Herald claimed that he distributed and admitted to distributing "smear" fliers. However, his status as a public official ended at the latest on December 31, 1983 when he ceased being a councilman. The Lake County Telegraph's allegations that he was

found "guilty" by a "court" of election crimes did not come until almost six months later. The record shows that Petitioner was not a public official at that time and he was likewise not a public figure as he did not "voluntarily thrust himself into the forefront" of the election law controversy. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). Thus, Petitioner was not legally required to establish a genuine issue of fact in dispute as to actual malice in order to survive the motion for summary judgment filed by these Respondents.[5]

The Court of Appeals below determined that Roland Mastandrea was both a public

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[5]Consistent with Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Ohio has adopted a negligence standard which a plaintiff must prove by clear and convincing evidence. Landsdowne v. Beacon Journal Publishing Co., 32 Ohio St. 3d 176 (1987).

figure and a public official on May 11, 1984 (Opinion at 6) despite the passage of time. The rationale cited for that conclusion was the Supreme Court of Ohio's decision in Scott v. The News Herald, 25 Ohio St. 243 (1986) wherein one issue was whether a public school superintendent who had retired several months before he was accused of committing perjury was still a public official. The Scott court held that the retirement was not "germane because the averred defamatory remarks were made in the course of actions arising from official conduct." Id. at 247.

However, the issue here is quite different. Petitioner was defamed by a newspaper fully six months after he ceased being a public official and not for conduct related to his candidacy for mayor or his performance as a councilman. Instead, he was said to have been found "guilty" by a "court" for election law

crimes when this was plainly not true. While the allegations relate back to the election campaign, they do not relate to his conduct qua a public official at all but rather to his status as a respondent in a quasi-judicial proceeding.

This Court has not had the occasion to determine when a former public official's status for defamation purposes ends. To a limited extent the question was addressed in Rosenblatt v. Baer, 383 U.S. 75 (1966). Justice Brennan's opinion for the majority noted that ". . . there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the New York Times rule." Id. at 87, N.14. Here, however, the defamatory statements did not concern Petitioner's performance as a candidate or as an

elected public official. See, too, Wolston v. Reader's Digest Assn., 443 U.S. 157 (1979).

In Durham v. Cannon Communications, Inc., 645 S.W. 2d 845 (Tex. App. 1982). A Texas court held that an attorney appointed as special prosecutor to investigate alleged mismanagement of government funds and who had completed his work two months before being defamed in a television broadcast wherein it was alleged that he was connected with a house of prostitution was not a public official for defamation purposes because the defamation did not " . . . concern the manner in which [he] conducted his official duties as a special prosecutor."

Here the defamation did not specifically relate to the controversy over the "Wake Up Willoughby" flier at all. Rather, it related to the Ohio Election Commission's action on a

complaint filed by Petitioner's political foes relating to the erroneous allegation that he had admitted distributing and did in fact distribute that flier.

The question has also arisen in the "public figure" context. The Courts below merely assumed that Petitioner had such a status. The actual malice standard extends to persons who ". . . do not hold public office at the moment [but who] are nevertheless ultimately involved in the resolution of important public questions or, by reason of their fame, shape events in the areas of concern to society at large." Curtis Publishing Co. v. Butts, 388 U.S. 120, 130 (1967) (C.J. Burger, concurring). Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) refined and narrowed the concept into general purpose and limited purpose public figures. Id. at 352. The status is limited to those who assume "special prominence in the

resolution of public questions." The Court said that ". . . absent clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable . . . to [look] to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." Id. at 352.

Clearly Petitioner was not a general purpose public figure as he plainly lacked "general fame and notoriety in the community and pervasive involvement in the affairs of society." Gertz, 418 U.S. at 352 (1974). Similarly, Petitioner did not voluntarily thrust himself to the forefront of the Elections Commission controversy since he was merely defending himself from his political opponents'

charges. The record contains no evidence that he did anything affirmatively to bring attention to himself in relation to these charges. "Resort to the judicial process . . . is no more voluntary in a realistic sense than that of a defendant called upon to defend his interests in court." Boddie v. Connecticut, 401 U.S. 371, 376-377 (1971).

Accordingly, Petitioner was neither a general purpose nor limited purpose public figure on May 11, 1984 when he was defamed by Mr. Haynes and The Lake County Telegraph.

However, even if Petitioner was a limited purpose public figure on May 11, 1984, it does follow that the actual malice standard applied to him as to the disputed article. This is because the defamation did not concern his conduct during the election campaign but, rather, the results of the Election Commission's

proceedings. Limited purpose public figure status remains such "for purposes of later commentary or treatment of that controversy. (Emphasis in original). Newson v. Henry, 443 So. 2d 817, 822 (Miss. 1983).

The decision of the Court of Appeals to the effect that Petitioner had to demonstrate actual malice with clear and convincing evidence at the summary judgment stage as to the May 11, 1984 article is fundamentally flawed. This Court has the opportunity to correct that error and to delineate how, when and under what circumstances a public official and/or a limited purpose public figure loses that status for defamation purposes.

CONCLUSION

Petitioners respectfully request that this Court grant their petition to consider each of the important questions presented.

Respectfully submitted,

BRENT L. ENGLISH
140 Public Square
611 Park Building
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(216) 781-9917
Counsel of Record for
Roland Mastandrea and
Maureen Mastandrea

CERTIFICATE OF SERVICE

I hereby certify that two true and complete copies of the foregoing Petition for a Writ of Certiorari were mailed by regular U.S. Mail, postage prepaid, this ____ day of June, 1990 to the following counsel of record: Richard D. Panza, Esq.,

Wickens, Herzer & Panza Co., L.P.A., 1144 West Erie Avenue, Lorain, Ohio 44052 (216) 244-5268, attorney for The News Herald, The Lorain Journal Co. and Paul O'Donnell; Forrest Norman, Esq., Gallagher, Sharp, Fulton & Norman, 630 Bulkley Bldg., 1501 Euclid Avenue, Cleveland, Ohio 44114 (216) 241-5310, attorney for Rowley Publications, Inc., Geoffrey Haynes and The Lake County Telegraph.

_____
BRENT L. ENGLISH
Counsel of Record for
Roland Mastandrea and
Maureen Mastandrea

APPENDIX

THE SUPREME COURT OF OHIO

1990 TERM

To wit:
March 21, 1990

Roland Mastandrea, et al.,	:	Case No. 90-20
Appellants,	:	
vs.	:	E N T R Y
Lorain Journal Company, et al.	:	
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Lake County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte

for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Brent L. English Law Offices.

(Court of Appeals No. 13078)

/s/ Thomas J. Moyer
Chief Justice

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO)
) SS:
COUNTY OF LAKE)

JUDGMENT ENTRY

CASE NO. 13-078

November 8, 1989

ROLAND MASTANDREA, et al.

Plaintiff-Appellants,

vs.

LORAIN JOURNAL CO., et al.

Defendants-Appellees.

For the reasons stated in the opinion of this court, the assignments of error are without merit, and it is the judgment and order of this court that the judgment of the trial court is affirmed.

/s/ JUDITH A. CHRISTLEY
Presiding Judge for the Court

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

J U D G E S
HON. JUDITH A. CHRISTLEY, P.J.,
HON. JOSEPH E. MAHONEY, J.,
HON. DONALD R. FORD, J.,

Filed: November 8, 1989

ROLAND MASTANDREA, et al.,

Plaintiff-Appellants

- vs -

CASE NO:
13-078

LORAIN JOURNAL CO., et al.,

Defendants-Appellees

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court
Case No. 84 CIV 1263

JUDGMENT: Affirmed

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CHRISTLEY, P.J.,

In November 1983, Roland Mastandra was one of three candidates for Mayor of Willoughby. During the campaign, a political flier titled "Wake Up Willoughby" was distributed by Mastandrea supporters. This handbill sparked controversy in what was already a hotly contested campaign and became the subject of newspaper articles which Mastandrea claimed were defamatory. Mastandrea claimed he had nothing to do with the printing or distribution of the fliers; however, he thereafter circulated an

explanatory letter wherein he took "full responsibility" for the flier.

On November 7, 1984, appellants Roland Mastandrea and Maureen Mastandrea filed a complaint, pro se, in the Lake County Common Pleas Court alleging defamation against appellees Lorain Journal Co., Paul O'Donnell, Rowley Publications, Geoffrey Haynes, George Tegner, Jr., George Tegner III, Charles Cox and others. (Claims against the other defendants were dismissed by the court on April 14, 1986.)

This court should note that appellees Charles Cox and George Tegner, Jr. and George Tegner III have filed separate appellate briefs concerning the fourth assignment only. On page three of their brief, appellants state that "claims asserted against eleven individuals for libelous republication of the defamatory article written by Paul O'Donnell and published by the Lorain Journal Company

on November 8, 1983 and for the torts of intentional and negligent infliction of emotion distress *** are still pending." However, on April 14, 1986 the court granted summary judgment in favor of Cox and the Tegners. No appeal was taken from this April 14, 1986 judgment, and the instant appeal does not appear to be directed towards Cox or the Tegners. Appellants acknowledged at oral hearing that this appeal was not directed at Cox and the Tegners.

On February 1, 1988, the court granted Rowley Publications' and Geoffrey Haynes' motion for summary judgment, vacated its prior denial of summary judgment on behalf of Lorain Journal and Paul O'Donnell, and granted summary judgment as to them also.

On February 29, 1988, appellants timely filed a notice of appeal and assigned the following as error:

1. The trial court committed reversible error by granting summary judgment to the Lorain Journal Company and Paul O'Donnell when there were genuine issues of fact in dispute as to whether a reasonable jury, acting reasonably, could find actual malice with convicing clarity in their publication of a defamatory article on November 8, 1983.

2. The trial court committed reversible error by granting summary judgment to Rowley Publications and Geoffrey Haynes when there were genuine issues of fact in dispute as to whether a reasonable jury, acting reasonably, could find actual malice with convincing clarity in their publication of a defamatory articles on May 11, 1984.

3. The trial court erred in granting summary judgment to Rowley Publications and Geoffrey Haynes when the evidence showed that Appellant was neither a public official nor a public figure and thus the actual malice standard did not apply and when there was a genuine issue of material fact in dispute concerning negligence in publishing the article of May 11, 1984.

4. The trial court committed reversible error by granting summary judgment to all Appellees on appellant Maureen Mastandrea's claims when they adduced no evidence respecting those claims.

In their first assignment of error, appellants argue that the court should not have granted summary judgment to the

Lorain Journal and Paul O'Donnell. This assignment is not well taken.

On election day, November 3, 1983, the Lorain Journal, which is the publisher of the Lake County News-Herald, published an article by one of its reporters, Paul O'Donnell, titled "MASTANDREA admits distributing 'smear' fliers." Appellants argue that the Lorain Journal knew that this was false because Roland Mastandrea never admitted, and in fact denied, distributing "smear fliers." However, prior to the article's publication, Mastandrea passed out a letter to the effect that he took "full responsiblity" for the fliers. Mastandrea asserts that the Lorain Journal's article contributed to his loss of the campaign, damaged his reputation in the community, and adversely affected his health and family life.

Although appellants do not raise it until the third assignment of error,

the first issue is whether Mastandrea was a "public official."

At the time of the publication of the article, Mastandrea was a councilman and a mayoral candidate. He was also an individual who had voluntarily injected himself into a particular public controversy and had assumed prominence in the resolution of a public question, i.e., the outcome of the Willoughby mayoral race. See, Gertz v. Welch (1974), 418 U.S. 323, 41 L. Ed. 2d 789.

However, at the time of the publication of the Haynes article, Mastandrea was neither a candidate nor a holder of public office.

Therefore, appellants argue that Mastandrea was no longer a "public official" or "public figure" on May 11, 1984, for purposes of the "actual malice" standard. In Scott v. News-Herald (1986), 25 Ohio St. 3d 243, a controversy arose

out of an interscholastic event wherein Scott was acting in an official capacity as a school superintendent. Thereafter, a legal hearing was conducted wherein it was claimed that Scott had perjured himself. Before the legal hearing and the publishing of the allegedly defamatory newpaper column, Scott retired. However, the Ohio Supreme Court commented in a footnote as follows:

> "Appellant's retired status at the time of the legal hearing is thus not germane because the averred defamatory remarks were made in the course of action arising from official conduct that were, most importantly, matters of import to the community's legitimate interest in a public official's performance of publc responsibilities. Justice Brennan in his majority opinion in Rosenblatt ((1966), 383 U.S. 75) reiterated the 'strong interest in debate on public issues, and *** a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of govenment is at the very center of the constitutionally protected area of free discussion.' Id. at 85. It is similarly our view, under Ohio's Constitution,

> that the subsequent retirement of an individual does not diminish his or her status with respect to the discussion and debate of issues related to a prior status or position." At 247. (Emphasis added.)

Thus, pursuant to Scott, appellant was still a "public figure" or "public official" with respect to the May 11, 1984 article and the "actual malice" standard applied. It is also to be noted that the time lapse between Mastandrea's public official status and the May 11, 1984 article is approximately six months during which time the controversy apparently had not died, as during this time a hearing was initiated before the Ohio Elections Commission.

In Scott, supra, the court discussed the burden of proof with respect to the defamation of a plaintiff who is a public official.

This reasoning was later followed in Varanese v. Gall (1988), 35 Ohio St.

78, wherein the court held:

> "***(t)he concept of actual malice in defamation cases involving public officials is separate and distinct from the traditionally defined common-law standard of malice or actual malice. Actual malice in the context of defamation may not be inferred from evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motives for publishing are irrelevant. A defamation plaintiff who is required to show actual malice must demonstrate, with convincing clarity, that the defendant published the defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity."

Civ. R. 56(C) provides that summary judgment shall be rendered if there is nuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In Varanese, the court discussed the review of summary judgments in defamation cases as follows:

> "In reviewing the instant cause, this court is mindful of its responsibility to conduct an indepen-

dent examination of the record to ensure against forbidden intrusions into constitutionally protected expression. Bose Corp. v. Consumers Union of U.S., Inc. (1984), 466 U.S. 485, 508, rehearing denied (1984), 467 U.S. 1267. We are also aware of the fact that the judgment before us is the trial court's granting of appellant's motion for summary judgment. This court has observed that '(s)ummary procedures are especially appropriate in the First Amendment area' due to the potential chilling effect which the threat of a lawsuit may have on the exercise of First Amendment rights. Dupler, supra, at 120, 18 O.O. 3d at 357, 413 N.E. 2d at 1191. It is for this reason that the plaintiff's burden of establishing actual malice must be sustained with convincing clarity even when the plaintiff's case is being tested by a defendant's motion for summary judgment. Dupler, supra, at paragraphs one and two of the syllabus; Bukky, supra, at syllabus. The United States Supreme Court has recently held that 'a court ruling on a motion for summary judgment must be guided by the New York Times 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists - that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity.' Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 257, 91 L. Ed. 2d 202, 217. It should be remembered, however, that for purposes of ruling on a defendant's

summary judgment motion in this context, '(t)he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' Id. at 255, 91 L. Ed. 2d at 216.

With all these principles in mind, we turn now to a consideration of whether appellee sustained her burden of demonstrating actual malice with convincing clarity. Our determination of this question mandates an independent review of the record and, particularly, the evidence adduced by appellee in opposition to appellant's motion for summary judgment." At 80-81 (Emphasis added.)

As part of appellee's submission with their motion, the reporter, O'Donnell, stated that he "believed the story to be fair, accurate and truthful at the time it was published, and still believes the article to be entirely fair accurate and truthful ***." Per Varanese, this court must examine the evidence adduced by appellants in opposition to the Lorain Journal's and O'Donnell's motion for summary judgment.

Appellants attached and incorporated by affidavit ten exhibits to their memorandum in opposition to the motion for summary judgment. The first exhibit is a copy of the article. This exhibit was no doubt offered to show the contents of the article and not to prove actual malice since "no contention is made, and none could be made, that the allegations in the ad are 'so inherently improbable that only a reckless man would have put them in circulation.' St. Amant, supra ((1986), 390 U.S. 727), at 732." Varanese at 81.

The second, fourth, fifth, sixth, eighth, and ninth exhibits are copies of articles in the Lake County Telegraph and the News-Herald. None of these "annexes" contribute to this court's inquiry as to the Lorain Journal's or to O'Donnell's state of mind at the time of publication of the article. The

third exhibit is a copy of the "Wake Up Willoughby" flier. The seventh exhibit is a copy of the letter/flier titled "From R. Mastandrea" wherein Mastandrea claims to take "full responsibility" for the "Wake Up Willoughby" flier. The tenth exhibit is Mastandrea's affidavit. Attached to this affidavit are various exhibits, none of which are probative of O'Donnell's and the Lorain Journal's state of mind.

One of these exhibits is a copy of a transcript of a meeting between Roland Mastandrea and Paul O'Donnell which Mastandrea recorded unbeknownst to O'Donnell. In their appellate brief, appellants state that this transcript is the best evidence that the Lorain Journal knowingly published a defamatory falsehood. However, a perusal of this transcript does not reveal evidence intending to show that either O'Donnell or the Lorain

Journal had actual knowledge that the disputed statements in the article were false or that he had a high degree of awareness of their probable falsity. In support of their arguments, appellants specifically cited a portion of the transcript in which O'Donnell allegedly admits that the article was edited and altered by the Lorain Journal after he turned it in and that Roland Mastandrea should be "pissed" about it. Specifically, his comments were: "I think you ought to be real pissed about it. We always -- we being the newspaper -- always talk about responsibility and how we have to have responsible (sic). I think we are really bad at policing ourselves." His comments are therefore not probative that the Lorain Journal article was false or that it had a high degree of awareness of its probable falsity at the time of the alteration.

In their motion for summary judgment, appellants also cite to portions of various depositions which they claim to be supportive of their position. In particular, appellants point out the testimony in the depositions of Charles Fox, John Gorman and Mike Somrack to show that they told O'Donnell that Mastandrea did not distribute any fliers. This evidence is not probative of whether O'Donnell believed Mastandrea to be the person responsible for the distribution of the fliers. These statements from Mastandrea supporters that Mastandrea did not personally distribute the fliers may have alerted O'Donnell as to the possible problem. However, as was previously discussed, O'Donnell obviously felt that his article as written prior to editing did not malign Mastandrea. Further, these statements do not indicate that the person(s) responsible for the editing realized with a high degree of

awareness, the probable falsity. The statements are not enough, particularly in light of the letter "accepting responsibility" which was authorized by Mastandrea. For liability to attach, a defendant must proceed to publication despite a high degree of awareness of the probable falsity of the published statements. Varanese at 18.

Thus, looking at the record and evidence in support of appellants' position, this court must come to the conclusion that appellants did not sustain their burden of demonstrating "actual malice" with "convincing clarity" in reference to Paul O'Donnell and the Lorain Journal.

In defense of the first assignment, appellees Lorain Journal and O'Donnell have presented various arguments that the article was constitutionally protected speech. However, at this summary judgment stage, the facts alleged by appel-

lants are to be assumed as true, i.e., this court must believe appellants' assertions that Mastandrea did not distribute the fliers. In Varanese, supra, the court held:

> "***It should be remembered, however, that for purposes of ruling on a defendant's summary judgment motion in this context, '(t)he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' Id. at 255, 91 L. Ed. 2d at 216.***" at 81.

This issue was also discussed in Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242, 91 L. Ed. 2d 202, 216 as follows:

> "Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed,

> and all justifiable inferences are to be drawn in his favor. Adickes, 398 US, at 158-159, 26 L Ed 2d 142, 90 S Ct 1598. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co. 334 US 249, 92 L Ed 1347, 68 S Ct 1031 (1948)."

Appellants adduced some evidence in their motions contra to show that Mastandrea did not distribute the fliers. Specifically, the depositions of his supporters indicated that he did not physically participate in the distribution. Mastandrea's deposition and affidavit are to the same effect. For purposes of the summary judgment proceedings, this evidence should be believed. Therefore, assuming that Mastandrea did not participate in distributing the fliers, appellants still have failed to show that the Lorain Journal and O'Donnell published a defamatory statement with

actual knowledge of or a high degree of awareness of its probable falsity.

In their second assignment of error, appellants argue that the court erred by granting summary judgment to appellees Rowley Publications and Geoffrey Haynes. This assignment is not well taken.

The record shows that shortly after November 1983, Willoughby Mayor Eric Knudson and Councilmen Charles Cox, Richard Piepsny, Richard Wagner and George Gamber initiated a statutory proceeding before the Ohio Elections Commission against Roland Mastandrea stemming from the "Wake Up Willoughby" fliers. They alleged that Mastandrea had violated Ohio's election laws relating to identification of political campaign literature, R.C. 3599.09, and relating to unfair political campaign activities, R.C. 3599.091(B)(10).

On May 10, 1984, the Elections Commission conducted a hearing on the matter. A reporter for Rowley, appellee Geoffrey Haynes, attended and testified at this hearing as a witness and thereafter wrote an article titled "MASTANDREA Guilty in 'Willoughbygate.'" This article was published on May 11, 1984 in the Lake County Telegraph, owned by Rowley. Appellants contend that the article defamed them by alleging that Mastandrea was "guilty" of "Willoughby-gate" as determined by a "court" and was thus subject to criminal sanctions.

As discussed, "actual malice" is "actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity." Varanese, supra.

The May 11, 1984 article described the outcome of the proceeding before the Ohio Elections Commission. Appellants

argue that the article was defamatory because it alleged that Mastandrea was found "guilty" by a "court" and subjected to penalties whereas the Commission had merely determined that there was probable cause to believe that Mastandrea had violated Ohio elections law. Appellants also objected to the characterization of the matter as "Willoughbygate." Appellants' evidence in support of their allegations consists of an affidavit by Roland Mastandrea, Haynes' deposition, and an affidavit by the former chairman of the Ohio Elections Commission and the transcripts of the hearing before the Ohio Elections Commission.

There is merit to the contention that the average person reading the May 11, 1984 article and headline could well have been led to believe that Mastandrea had been convicted and penalized for campaign violations. As discussed

earlier in this review, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Varanese and Anderson, supra. Nevertheless, assuming arguendo that the article was defamatory, appellants still have to demonstrate "actual malice" with "convincing clarity."

This is a difficult burden because it forces a plaintiff to prove that was in a reporter's and publisher's mind. In many, if not most cases, this may be an insurmountable obstacle to recovery; however, as the court stated in St. Amant v. Thompson (1968), 390 U.S. 727:

> "it may be said that such a test puts a premium on ignorance, encourages the irresponsible publishers not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reason-

able man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

The defendant in a defamation action brought by a public official cannot, howeve, automaticaly insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable

> that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

The record shows that appellant's argument is, in essence, the last point of the above quote. Haynes was present at, and testified before, the Election Commission's hearing on the matter. It is undisputed that the legal purpose of the hearing was to determine probable cause despite the fact that appellees have submitted an affidavit from a member of the commission attesting that the members of the commission felt that Mastandrea was culpable in the preparation and distribution of the "Wake Up Willoughby" fliers. Further, the chairperson of the Commission concluded the hearings with a vote of the Commissioners, finding there had been two "violations" of the election law and referring the

matter to the county prosecutor for further prosecution.

Appellants assert that, in advance of the commission's proceedings, Mastandrea discussed the import of the proceedings with Haynes and informed him tha they were "aimed only at finding probable cause." Furthermore, during the commission's hearing, an attorney for Mastandrea's adversaries stated, "*** we would ask this commission to find that there is probable cause with respect to Section 3599.(B)(10).***" And staff counsel for the Commission stated that "*** this proceding could ultimately lead to criminal action.***" These statements made during the seven hour hearing could have put Haynes on notice as to the actual import of the hearing.

Haynes, nevertheless, has testified that he believed tha article to be true,

that he did not have any knowledge that any of the things contained in the article were false, and that he did not entertain any serious doubts as to the truth or falsity of anything in the article. Haynes states that he learned what "probable cause" meant only after this lawsuit was filed. At best, this evidence merely shows that Haynes was negligent or possibly knew that the information in the article could be false. This is not enough. Appellants must demonstrate with convincing clarity a high degree of awareness of its probable falsity. Varanese, supra. "Since reckless disregard is not measured by lack of reasonable belief or of ordinary care, even evidence of negligence in failing to investigate the fact is insufficient to establish actual malice." Scott, supra. Doubts as to possible falsity of an ad are immaterial. Varanese

at 82. Haynes may have been negligent for not investigating the meaning of "probable cause" on the import of the hearing; however, "*** mere negligence is constitutionally insufficient to show actual malice. ***" Varanese at 82.

Appellants also make much of the fact that Haynes travelled to the hearing accompanied by Mastandrea's adversaries. However, this evidence would not be probative or Haynes' state of mind as to the falsity of probable falsity of the statements in the article. At most, it may tend to show a bias in favor of Mastandrea's adversaries, however, even "*** spite, ill will or deliberate intention to injure, as the defendant's motives for publishing are irrelevant." Varanese, supra.

Even if there was some evidence which supported appellants' contentions as to the knowledge of falsity or probable

falsity of the article, there is another hurdle in regard to news reports of judicial proceedings which appellants must clear in order to avoid summary judgment.

Appellees argue that the holding in Haynik v. Zimlich (C.P. 1986), 30 Ohio Misc. 2d 16, applies in this case. There the court held at syllabi one and three:

> "The 'record' or 'fair report' privilege protects news reports of judicial proceedings, including reports of an arrest and indictment. The privilege applies so long as the news report deals with a matter of public concern and is a fair and substantially accurate account of the judicial proceedings or of information provided by the government.
>
> A news report is considered a substantially accurate account of official government information or of a govenment report if the "gist" or the "sting" of the allegedly defamatory aspects of the news report taken as a whole accurately reflects the substance of the judicial proceedings or other information obtained from official reports. Errors as to secondary facts, that is, facts which do not

> change the import of the story or substantially alter the substance of the allegedly defamatory (but protected) aspect of the story, are not actionable."

"The 'record' privilege is abused only if it is shown that defendants published their reports solely for the purpose of causing harm to the plaintiff." Haynik at 21. "So long as the account presents a fair and accurate summary of the proceedings, the law abandons the assumption that the reporter adopts the defamatory remarks as his own. Haynik at 19.

In this case, the article was a report of the proceedings of the Elections Commission's determination of probable cause to prosecute Mastandrea for campaign violations. This was a matter of public concern at least to the citizens of Willougby. However it is very arguable that the article was in fact a fair and subtantially accurate account of the

proceedings. The appellants allege the article implied that Mastandrea was found guilty of "Willoughbygate" by a court. Appellants' claim stems from the signle use of the word "court" in the article when Haynes wrote "The court refused to accept the tape as evidence***". In all other instances the commission was correctly labeled. Furthermore, the commission does act in a quasi-judicial mode in a probable cause hearing. As was previously noted, the commission did determine that the finding of "mis-statements" by Mastandrea constituted two violations of the elections laws. These secondary facts do not change the import of the story or substantially alter the substance of the story. Finally, the matter was referred for further prosecution, even though it was ultimately "no billed" by the Lake County Grand Jury. Therefore, looking

at the article as a whole, it accurately reflects the substance of the proceedings. Therefore, this article is also protected by the "fair report" privilege.

As to the term "Willoughbygate," it is "mere hyperbole or rhetoric, and is an expression of opinion, not fact; and is protected," Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 359, at 372.

Appellants have failed to establish "actual malice" with "convincing clarity" and their assignment is therefore not well taken.

In their third assignment of error, appellants argue that the court erred in granting summary judgment because the "actual malice" standard did not apply and there was a genuine issue of material fact for the jury. However, these arguments were already addressed in the second assignment and are not well taken.

In their fourth assignment of error, appellants argue that the court erred by granting summary judgment on Maureen Mastandrea's claims. This assignment is not well taken. Maureen Mastandrea has no direct claim against any of the appellees since the articles concerned Roland Mastandrea only. In Messmore v. Monarch Machine Tool Co., (1983), 11 Ohio App. 3d 67, syllabus two, the court held:

> "A cause of action based upon a loss of consortium is a derivative action and as such cannot afford greater relief than that which would be permitted under the primary cause of action. Therefore, an award for loss of consortium cannot exceed that percentage of damages recoverable by the injured spouse. Such an award must be reduced by an amount that is proportionately equal to the percentage of negligence of the injured spouse in accordance with R.C. 2315.19(C)."

Therefore, since Roland Mastandrea's claims must fail, so also must fail Maureen Mastandrea's claims.

The judgment of the lower court is affirmed.

/s/ Judith A Christley
PRESIDING JUDGE

MAHONEY, J.
FORD, J., concur

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

ROLAND MASTANDREA, et al Plaintiffs,	)	CASE NO. 84 CIV 1263
-vs-	)	JUDGMENT ENTRY
LORAIN JOURNAL COMPANY, et al. Defendants.	)	January 29, 1988

Upon consideration, Rowley Publications and Geoffrey Haynes' motion for summary judgment on plaintiffs' complaint is granted. Furthermore, upon reconsideration, the court hereby vacates its prior denial of summary judgment on behalf of The Lorain Journal and Paul O'Donnell and hereby grants the same as Scott v. The News Herald (1986), 25 Ohio St. 3d 243.

Furthermore, the Lorain Journal and Paul O'Donnell's joint motion to dismiss the crossclaim of Charles Cox is granted.

In accordance with Civil Rule 54(B), the court finds no just cause for delay.

IT IS SO ORDERED.

/s/ James W. Jackson
Judge of the Court of
Common Pleas

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Mastandrea admits distributing 'smear' fliers

By Paul O'Donnell
News-Herald Staff Writer

Willoughby mayoral candidate Roland J. Mastandrea admits he and several campaign supporters distributed anonymous literature last weekend attacking Mayor Eric Knudson and four councilmen.


Mastandrea

In a letter passed out to Willoughby residents yesterday, Mastandrea said he is taking "full responsibility" for the handbill accusing Knudson and four councilmen of hiding a large revenue deficit from the public.

He said he didn't sign it because he thought it would be more credible. He also declined to explain exactly who planned and carried out the well-orchestrated canvass of several thousand Willoughby homes Friday night.

"I knew about it and I felt it was something that needed to be said," said Mastandrea, who is also the Ward 2 councilman. "I knew it was going to be coming out shortly before the election."

"I feel that I am the leader, and I am responsible for what I and others do," he added. "I knew about and I didn't stop it."

The literature also charged that Knudson and his four "hand-picked cronies will spend thousands and thousands to buy your vote and keep you uninformed."

Mastandrea denied any knowledge of who distributed the unsigned handbill when contacted Saturday by the News-Herald. He said he told a reporter that his "committee has no knowledge and nothing to do with it" because the handbill wasn't approved by his campaign committee.

Knudson, however, filed a complaint yesterday with the Lake County Elections Board that alleges Mastandrea violated election laws by not placing his name on the handbill, titled "Wake Up Willoughby."

Mastandrea said he stands behind the charges made in the literature. He also said he thinks the handbill is not illegal because it wasn't paid for by his committee.

"In fact, the majority of my (nine-member) committee didn't even know about it," he said. "I didn't want it coming from the committee so I never presented it to the committee."

He declined to name the campaign supporters who helped him prepare and distribute the handbills, although he said those listed as members of his campaign committee weren't involved.

Mastandrea said some people might "think it was a bad judgment call" that the statements on the handbills were not attributed to him. He added, however, that he intended the literature to be informational, not political.

"If I had put out the literature as a candidate, it would be just another piece of political material," he said. "The intention was to put out an informative piece of material of what I feel, and what others feel, they should know about the election. It wasn't asking for a vote."

Mastandrea, 31, and his campaign advisers held lengthy meetings the last two days to discuss whether Mastandrea should admit what he did. Mastandrea said he wants voters to "clearly understand" why he distributed the handbill before voting today.

"I felt that the real issue of the handout was being clouded by all the speculation of who had done it and what it really was," he said.

Mastandrea estimated that about 18 campaign supporters canvassed 6,000 homes between 1:30 and 7:30 p.m. yesterday distributing the typewritten, one-page letter.

His letter also urged voters to continue supporting his candidacy because "I know the people of Willoughby want to be represented by someone who operates in truth."

WAKE UP WILLOUGHBY

QUESTION: Why are 4 councilmen and the Mayor endorsing one another for re-election/

ANSWER: Mayor Knudson hand picked and appointed-

Richard Piepsny
Chuck Cox
Rick Wagner
George Gamber

QUESTION: Why do these 4 councilmen and the Mayor support one another when it comes to making policy decisions about our city?

ANSWER: Because they <u>owe</u> each other!

QUESTION: Can these people really represent you the people of Willoughby, or do they represent a special interest group?

ANSWER: The record speaks for itself.

QUESTION: What ever happened to the <u>checks and balances of government?</u>

ANSWER: It has been tampered with by the mayor and these 4 councilmen.

QUESTION: Did you know that income tax and other revenues for the city are way below projections nearly $200,000? After the first of the year, we could be facing serious cut backs in services. Why isn't the public aware of this?

ANSWER: Because the mayor and his 4 hand picked councilmen are keeping this from you until after the election.

QUESTION: Why isn't the public aware of all these activities?

ANSWER: Because the mayor and his hand picked cronies will spend thousands & thousands to buy your vote and keep you uninformed.

Elect those who represent the people--not an entrenched elite.

WILLOUGHBY CANNOT BE BOUGHT!

2. Contrary to what has been portrayed, the City is not financially sound. The income tax revenue alone is nearly a quarter of a million dollars off from projections. This has caused a number of projects to be terminated. For example, the rebuilding of the aerial fire truck has been tabled, which could seriously jeopardize the safety of the people of Willoughby.

The thrust of my campaign over this past year has been to build a positive image emphasizing my accomplishments on council and how I would serve the people of Willoughby as your Mayor. The mechanics of the handout were unfortunate; however, the real misfortune of this 1983 election is not what has been said but what has not been said. This handout was intended only to inform the people of Willoughby of what I believe they would want to know.

I urge you to continue to support my candidacy for Mayor.

I trust in the people of Willoughby. I believe in the people of Willoughby, and I know the people of Willoughby want to be represented by someone who operates in truth.

Very sincerely,

Roland J. Mastandrea

Paid for by Committee to
Elect R. Mastandrea, J. Dugan,
Chairman, P. O. Box 175,
Willoughby, Ohio

A42

FROM R. MASTANDREA

.ar Willoughby Residents:

During the past weekend, an activity took place that is being questioned by the News-Herald and various individuals.

The point in question is the "Wake Up Willoughby" handout which was distributed in some neighborhoods in our city.

With this letter I hereby intend to take full responsibility for this handout. I would earnestly appeal to you the people of Willoughby to patiently read further and learn the purpose of its writing and method of its distribution.

Were this information to have been provided to the people of Willoughby in the form of campaign literature by a candidate or committee, it is my belief that it would have detracted from its validity. Therefore the handout was not produced or paid for by the Committee to Elect Roland Mastandrea. Nor did it specifically ask support for any particular candidate. However, it sought to provide the people of Willoughby factual information on two issues that I believe are crucial to the future of Willoughby.

1. The Mayor and his four appointed councilmen are endorsing one another for their election. I am concerned that their election would violate what I consider to be the proper checks and balances of government, and thereby deny the people of Willoughby effective representation.

THE LAKE COUNTY Telegraph
Your LOCAL NEWSpaper

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SUNNY & WARM
Full Color Weather Map
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Friday, May 11, 1984 25 cents

Mastandrea guilty in 'Willoughbygate'

A43

By GEOFF HAYNES
Staff Reporter

COLUMBUS Former Willoughby mayoral candidate Roland J. Mastandrea was found guilty of two election violations during Thursday's bizarre "Willoughbygate" hearings

Accusations of missing tapes and a clandestine recording of an unsuspecting reporter's lunch conversation with Mastandrea highlighted the 10-hour hearing before the Ohio Elections Commission

had malfunctioned.

He also told the commission he used a tiny tape recorder placed in a brief case to record a lunch conversation with a Lake County News-Herald reporter who was unaware he was being recorded.

Mastandrea said the tape revealed the reporter admitted he erred in a story that reported Mastandrea distributed the "Wake Up Willoughby" handbill.

The court refused to admit the tape as evidence due to a gap in the recording that occurred when

"In all my years in Willoughby politics, this is the first time something like this has happened," said Mayor Eric R Knudson of the hearing

Knudson and four city councilmen filed the original complaint against Mastandrea

The commission found Mastandrea guilty of participating in writing unsigned campaign literature that attacked Knudson and the councilmen with fallacious statements

The case will now be referred to the Lake County prosecutor's office for prosecution.

Mastandrea's controversial "Wake Up Willoughby" handbill was distributed to homes four days before the Nov. 8 election. It slammed Knudson's administration for "covering up" an income tax collection gap.

Mastandrea attempted Thursday to prove the cover-up existed by showing he requested tape recordings of two city meetings that discussed finances, but was told one tape couldn't be found and the other Mastandrea flipped the tape over

On Nov 7, three days after the handbill was delivered, Mastandrea accepted responsibility for it, but said he was not involved in distributing the literature

However, his campaign manager James R Dugan, testified Thursday that he believed Mastandrea had knowledge of the handbill

"In the course of that weekend it became clear that he Mastandrea was involved," Dugan said

Mastandrea has filed a counterclaim against Knudson for distributing the newspaper story that states Mastandrea distributed the "Wake Up Willoughby" handbill

That hearing will probably be conducted in June according to commission members

Distributing unsigned campaign literature is a misdemeanor that carries a minimum fine of $300 and a maximum fine of $2,000

Publishing false statements in campaign literature is also a misdemeanor, punishable by a fine of up to $1,000 and or a six-month jail sentence for each violation

Roland J Mastandrea former mayoral candidate in Willoughby, testified

Thursday at a Ohio Elections Commission hearing in Columbus. Mastandrea was found guilty of two election violations and faces prosecution.

Photos by Geoff Haynes